
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE:April 20, 1987
CASE NO. 85-ERA-23

In the Matter of

EDWARD C. EGENRIEDER

v.

METROPOLITAN EDISON COMPANY/G.P.U.

BEFORE: THE SECRETARY OF LABOR

ORDER OF REMAND

I have before me a Recommended Decision (R.D.) issued by Administrative Law Judge Daniel L. Leland in this case which arises under the whistleblower provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851(a) (1982).[1] The ALJ's order recommends as follows:

> (1) The case is remanded to the Area Director of the Employment Standards Administration to conduct an investigation to determine if respondent's actions toward complainant which took place within thirty days of March 28, 1985 were in violation of the Act.
> (2) The remainder of the complaint is dismissed as untimely.

R.D. at 7.

This case arises from a complaint (CX1)[2] filed by Edward C. Egenrieder (Egenrieder) in which he charged that Metropolitan Edison Company/G.P.U. (Metropolitan) violated Section 5851(a) by forcing him to go through with his resignation in August 1981

although he had changed his mind about resigning, and by blacklisting him for employment with other nuclear facilities and at Metropolitan where he had filed applications for various positions. He alleges that the discriminatory acts resulted "because I 'blew the whistle on the company' by giving testimony to the N.R.C. [Nuclear Regulatory Commission] and by writing non-compliance reports for not adhering to approved procedures." Egenrieder's Complaint at 7.

The Wage and Hour Division of the Employment Standards Administration responded (CX2) to Egenrieder's complaint, stating:

> You terminated your employment with Metropolitan Edison Company/G.P.U. in August 1981.
> Section 210(b)(1) of the ERA, copy enclosed, allows an employee who believes they have experienced discrimination, 30 days in which to file a complaint. Since the alleged discrimination comprising your complaint is outside this statutory time frame, only some extraordinary factual situation which would have prevented the timely filing of your complaint could toll the time limitation period. After carefully reviewing the information provided, we find that your complaint is not timely under Section 210 of the ERA.
> Consequently, the Wage and Hour Division cannot conduct an investigation into your complaint. The Division is not authorized to administratively waive the statutory provisions which set the 30-day limitation for timely complaints. In School District of the City of Allentown v. Marshall, 657 F.2d 16, 20 (3rd Cir. 1981), a case involving the similar employee protection provisions of the Toxic Substances Control Act, the Third Circuit Court of Appeals determined:
> The tolling exception is not an open-ended

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> invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause. We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.
> The choice of the appropriate time is not entrusted to the administrative agency or to the courts. It is the result of legislative determination made after weighing the various interests at stake . . . It is not for us or the Secretary to casually ignore the statutory limitations.

CX2 at 1-2.

Egenrieder requested a hearing on his complaint. However, the only issue considered at the hearing was the timeliness of the complaint. Thus, the ALJ's R.D. is limited to that single issue.

After the hearing Egenrieder submitted a brief to the ALJ in which he argued that the course of conduct by Metropolitan, which he alleged included discriminatory refusal to hire and blacklisting, which continued for more than three and one-half years, was retaliatory in nature and that his "complaint filed within thirty days of at least one

incident which was part of [Metropolitan's] discriminatory course of conduct, be found to be timely filed under [the ERA]." Brief of Complainant at 11-12.

Egenrieder's argument is apparently based on what has become known as the "continuing violation theory." It has been used in numerous cases brought under the Civil Rights Act, Title VII, 42 U.S.C. § 2000e-5e (1982), to preserve the timeliness of a claim where there is an allegation of a course of discriminatory conduct in which the charge was filed within 180 days of the last discriminatory act.[3] In such cases all acts related to the last discriminatory act are brought within the court's jurisdiction. *Van Heest v. McNeilab, Inc.*, 624 F.Supp. 891 (D.Del. 1985).[4]

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Bronze Shields involved a case brought under Title VII of the Civil Rights Act, in which the plaintiffs attempted to rely on the continuing violation theory to establish that their charges of discrimination were timely filed. In that case the court recognized the validity of the continuing violation theory[5] and found it to be "consistent with the remedial purposes of Title VII and the liberal interpretation to be given to all Title VII provisions . . . . Indeed, a Senate Conference Committee Report specifically recognized and approved the courts' expansion of the statutory filing period through the use of the continuing violation theory." 667 F.2d at 1081.

However, the Third Circuit held in *Bronze Shields*, as the Supreme Court had concluded in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *United Air Lines v. Evans*, 431 U.S. 553 (1977), that the facts of that case did not establish a continuing violation. 667 F.2d at 1084. The Supreme Court, in both *Ricks* and *Evans*, had distinguished between the present effects of a past violation and a current violation which is a part of a continuing course of discriminatory conduct. *See Id*. at 1083. Therefore, if the facts in a case do support a continuing violation, the Third Circuit would apply that theory to overcome a statute of limitations defense.

Since blacklisting,[6] by its very nature, is a continuing course of conduct, it may constitute a continuing violation if it is based upon an employee's protected activity under ERA.

In *Erdmann v. Bd. of Education Union County Regional High School District No. 1*, 541 F. Supp. 388 (D.C.N.J. 1982), although the court found no continuing violation, it said:

> When confronted with a claim of continuing violation, in order to determine the timeliness of EEOC complaints the district court must "identify precisely the 'unlawful employment practice' of which [plaintiff] complains," *Bronze Shields, supra*, at 1083, quoting *Ricks, supra*, at 257, 101 S.Ct. at 503. *Repeated denials of employment or promotion to an individual applicant such as plaintiff do not constitute a continuing violation unless the denials were based upon some*

allegedly discriminatory practice, policy or procedure utilized by the employer in making its employment decisions, and the plaintiff has brought a timely complaint of a present violation based on the employer's use of that same practice, policy or procedure.

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541 F.Supp. at 392 (emphasis supplied). *See also Tyson v. Sun Refining and Marketing Company*, 599 F. Supp. 136, 138 (E.D.Pa. 1984).

However, neither the Wage and Hour Division nor the ALJ considered whether the actions of Metropolitan might constitute a continuing violation. Instead they focused attention on the question as to whether equitable tolling had occurred, *i.e.*, whether there was any basis for waiving the thirty day time limit for the filing of a complaint.

I agree with both the Wage and Hour Division and the ALJ that there is nothing in the record that would support a conclusion of equitable tolling. Nevertheless, the claim of a continuing violation has not been considered and it should be, *see In the Matter of Thomas G. Bassett v. Niagara Mohawk Power Company*, Case No. 86-ERA-2, Secretary's Order of Remand issued July 9, 1986, especially since the ERA is remedial legislation and "should be given a construction consistent with its objectives".[8] *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19 (3rd Cir. 1981)(construing the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629, which has a whistleblower protection provision similar to the ERA, with the same time limitations).

The employee protection provision of the ERA must be read in conjunction with the Congressional declaration of policy and purpose which provides:

> (a) Development and utilization of energy sources
> The Congress hereby declares that the general welfare and the common defense and security require effective action to develop, and increase the efficiency and reliability of use of all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy and strengthen its position in regard to international trade, to make, the Nation self-sufficient in energy, to advance the goals of restoring, protecting, and enhancing environmental quality, and *to assure public health and safety*.

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42 U.S.C. § 5801 (emphasis supplied). Thus, employees must feel secure that any action they may take that furthers that Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities.

Blacklisting being both insidious and invidious, cannot easily be discerned. There may be a considerable lapse of time before a blacklisted employee has any basis for believing

he is the subject of discrimination. The continuing violation theory is an appropriate means for protecting employees from such an ongoing retaliatory practice.

The ALJ found that only those alleged violations that occurred within thirty days of March 28, 1985, the date of filing of Egenrieder's complaint, may be considered. However, as stated earlier, no consideration was given to whether the actions of Metropolitan, as alleged by Egenrieder in his complaint and testimony, might constitute a continuing violation.

Therefore, I am remanding this case to the ALJ[9] for a full hearing on the merits at which time Egenrieder will have an opportunity to fully develop the issue. In remanding this case I reach no conclusions, nor should any be inferred, as to the merits of Egenrieder's complaint. Without a full evidentiary hearing, it is not possible to determine whether Metropolitan's conduct, from the time it required Egenrieder to go through with his resignation to its last refusal to rehire him, was in violation of the ERA.

This case IS REMANDED to ALJ Leland for further proceedings is accordance with this order.

SO ORDERED.

WILLIAM E. BROCK
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] 42 U.S.C. § 5851(a) provides:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

[2] Complainant's exhibit.

[3] *See Bronze Shields, Inc. v. New Jersey Dept. of Civil Service*, 667 F.2d 1074 (3rd Cir. 1981), and the cases cited therein at 1081, n.17.

[4] In *Van Heest*, the court held:

> Defendant's contention that plaintiff is time barred because she felt she was a victim of discrimination in August, 1980, is not important. The continuing-violation doctrine recognizes that past discriminatory acts have occurred outside the limitations period, and plaintiff's awareness of those acts is irrelevant. The crucial requirement is that plaintiff file charges within 240 days of the last--not the first--discriminatory act in a course of conduct. Plaintiff will be allowed to litigate all claims that are part of that continuing violation, because she filed within 240 days of the end of that violation.

624 F.Supp. at 897.

[5] Since the case *sub judice* arises in the Third Circuit, that court's ruling on the issue must be considered.

[6] Blacklist. A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate; as where a trades-union "blacklists" workmen who refuse to conform to its rules, or where a list of insolvent or untrustworthy persons is published by a commercial agency or mercantile association.

BLACK'S LAW DICTIONARY 154 (5th ed. 1979).

[Editor's Note: The Slip Opinion does not contain a footnote "7"].

[8] In *Van Heest v. McNeilab, Inc.*, the court applied the continuing violation theory to a claim brought under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), as well as to a claim brought under Title VII of the Civil Rights Act. 634 F. Supp. at 896, 897.

[9] The ALJ recommended that the case be remanded to the Area Director of the Employment Standards Administration to investigate whether Respondent's conduct within thirty days of filing the complaint was in violation of the Act. Neither the ERA, nor the regulations specifically contemplate a remand for further investigation. While the initial inquiry should have considered the continuing violation claim, the parties are entitled to de novo consideration of this case and all extant issues once a hearing is requested before the Office of Administrative Law Judges. Accordingly, under the circumstances of this case, further review of this matter before the ALJ seems appropriate.